SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 611

THE IVANHOE BUILDING AND LOAN ASSOCIATION OF NEWARK, N. J., PETITIONER,

vs.

THOMAS A. ORR, TRUSTEE OF EASTERN SASH & DOOR COMPANY, BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Record from D. C. U. S., District of New Jersey	1	1
Docket entries	1	1
Stipulation of facts	2	1
Order reducing claim	6	4
Opinion of court	8	5
Order dismissing petition to review referee's order	11	7
Notice of filing petition for review	12	8
Petition for review	13	8
Order allowing petition for review to be filed	16	10
Assignments of error	17	11
Proceedings in U. S. C. C. A., Third Circuit	19	13
Order assigning judges	19	13
Minute entry of argument and submission	20	14
Opinion, Davis, J.	21	14
Decree	26	18
Clerk's certificate	27	19
Order allowing certiorari	28	21

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 13, 1935.

—5969-C

[fols. A & 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

In Bankruptcy, No. 17,602

In the Matter of Eastern Sash & Door Company, a Corporation of New Jersey, Bankrupt

Docket Entries

Apr. 23, 1932. Petition filed.
Apr. 23, 1932. Adjudication.
Apr. 23, 1932. Order of reference to George W. W. Porter, Newark, Referee.
June 24, 1932. Order appointing Thomas A. Orr, Trustee.
Sept. 28, 1932. Claim of The Ivanhoe Building & Loan Association of Newark, N. J.
July 12, 1933. Petition of Trustee and Order to Show Cause why said claim should not be re-examined.
Nov. 21, 1933. Order of Referee Porter reducing said claim.
Nov. 28, 1933. Exceptions to said Order filed.
Nov. 28, 1933. Petition for Review of said Order.
Dec. 18, 1933. Referee's Certificate of Review.
Dec. 21, 1933. Notice of Hearing on said Petition.
Jan. 15, 1934. Order of U. S. District Court Affirming Referee's said Order.
Feb. 23, 1934. Copy of Order of U. S. Circuit Court of Appeals Allowing Appeal.

[fol. 2] In United States Circuit Court of Appeals, For the Third Circuit

In Bankruptcy, No. 17,602

On Petition for Review of Order of U. S. District Court

In the Matter of Eastern Sash & Door Company, a Corporation of New Jersey, Bankrupt

Stipulation of Facts

It is hereby stipulated and agreed by and between Abraham Alboum, Esquire, attorney for petitioner, and Charles

E. Hendrickson, Esquire, attorney for the Trustee, that following are the facts at issue.

1. On July 21, 1927, Abraham Portnoff, et als.. executed and delivered their bond in the penal sum of $23,000 to The Ivanhoe Building & Loan Association of Newark, N. J., the petitioner herein; and at the same time the said obligors, being then the owners of property known and designated as No. 386 Leslie Street, Newark, N. J., to secure payment of said bond, executed and delivered to the petitioner herein a mortgage on said property, in the sum of $11,500.

2. On October 7, 1927, the said mortgagors sold and conveyed the said property to the bankrupt, which conveyance contained the following clause: "This property is conveyed [fol. 3] subject to a mortgage in the nominal sum of $11,500 held by the Ivanhoe B. & L. Association, which mortgage the grantee hereby assumes and agrees to pay."

3. On October 11, 1927, the bankrupt sold and conveyed the above-mentioned property to one Clara Yavne, which conveyance contained the following clause: "This conveyance is made subject to a mortgage held by the Ivanhoe B. & L. Association in the sum of $11,500 which the grantee hereby assumes and agrees to pay."

4. On April 2, 1932, the petitioner herein filed its bill of complaint in the New Jersey Chancery Court to foreclose said mortgage. Final decree was entered therein on June 30, 1932. Sheriff's sale was held on August 9, 1932, and the aforesaid mortgaged property was sold to complainant (petitioner herein) for $100, leaving a deficiency on said bond in the sum of $10,739.94.

5. On April 23, 1932, Eastern Sash & Door Company was adjudicated a bankrupt.

6. On September 28, 1932, and within six months from the date of said sheriff's sale, the petitioner herein filed its proof of debt, as a general unsecured claim, in the sum of $10,739.94, being the amount of said deficiency, as follows:

Decree in Foreclosure suit	$10,220.96
Interest on same	88.58
Taxed costs	386.07
Interest on same	1.99
Sheriff's Fees	65.88
	$10,763.48
[fol. 4] Less purchase price at Sheriff's Sale	100.00
	$10,663.48
Plus interest	76.46
Amount of deficiency	$10,739.94

7. On July 12, 1933, the Trustee herein filed a petition for re-examination of said claim, and thereupon the Referee in Bankruptcy made an order directing the petitioner to show cause why the said claim should not be re-examined, rejected and expunged; and the matter having been duly argued and heard, the said Referee did, on November 21, 1933, make and file an order that the said claim be reduced to $1739.94 and allowed at said amount upon the list of claims, as a general unsecured claim.

8. The Referee found as a fact and it is hereby stipulated and agreed, that the actual and true value of said property at the time of said sheriff's sale was $9000.

9. Thereupon petitioner filed exceptions to the Referee's said order and on November 28, 1933, the petitioner filed a petition for review of the Referee's said order. Thereafter said Referee filed a certificate of review, as provided by law.

10. Said petition for review came on to be heard before Honorable Guy L. Fake, Judge of the United States District Court, who, upon consideration thereof, did, on January 15, 1934, make an order confirming the Referee's said order. Petitioner duly excepted to said order, which exception was allowed and sealed accordingly.

[fol. 5] It is further stipulated and agreed that the following papers in this matter, and no others, shall be printed in and shall constitute the transcript of record on this appeal, viz:

1. This stipulation of facts.
2. Order of Referee Porter, dated November 21, 1933.

3. Ruling of Judge Fake, dated January 15, 1934.
4. Order of Judge Fake, dated January 15, 1934.

Dated: February 10, 1934.

Abraham Alboum, Attorney for Petitioner. Charles E. Hendrickson, Attorney for Trustee.

[fol. 6] In United States District Court, for the District of New Jersey

In Bankruptcy

In the Matter of Eastern Sash & Door Co., Bankrupt

Order Reducing Claim—Filed November 21, 1933

The Trustee of the estate of the above-named bankrupt having filed in the office of the Referee a duly verified petition praying that the proof of debt heretofore filed herein by Ivanhoe Building & Loan Association of Newark, New Jersey, an alleged creditor for $10,739.74, be re-examined, rejected, expunged or reduced, and an order having been made herein, that hearing be had thereon on the eighth day of August, 1933, and due notice of said hearing having been given to said claimant and to the said trustee, and the said claimant having appeared by counsel on said day and testimony having been taken thereon, now on reading and filing the Trustee's said petition and upon all the proceedings had herein and upon the evidence submitted to the Court and after hearing counsel and considering the memorandum filed by counsel,

It is on this twenty-first day of November, 1933, on motion of Charles E. Hendrickson, attorney for the Trustee, [fol. 7] Ordered that the prayer of said petition be and the same is hereby granted;

And it is further ordered, That the said claim of Ivanhoe Building & Loan Association of Newark, New Jersey, be and it hereby is reduced to $1739.94 and allowed at said amount upon the list of claims herein as a general unsecured claim.

G. W. W. Porter, Referee in Bankruptcy.

[fol. 8] IN UNITED STATES DISTRICT COURT

Before Hon. Guy L. Fake, U. S. D. J.

Lefcourt Building, Newark, N. J.,
Monday, January 15, 1934.

Appearances:

Abraham Alboum, Esq., for Ivanhoe Building & Loan Association of Newark, N. J.; Sidney L. Jacobs, Esq., appearing for Charles E. Hendrickson, attorney for Trustee.

OPINION

The Court (orally, at close of argument): As I understand the record, it discloses this, that the bankrupt purchased certain real estate from Portnoff & Adelstein who, prior to the sale to the bankrupt, had mortgaged the premises to the Ivanhoe Building & Loan Association, and the bankrupt assumed and agreed to pay the bond and mortgage as part of the purchase price for the said property. Thereafter, the bankrupt conveyed the property by deed to one Yavne, who assumed and agreed to pay the said bond and mortgage as part of the consideration price for the premises.

About five years after the bankrupt sold the property to Yavne, the bankruptcy proceeding with which we are now concerned was commenced by an involuntary petition. The claimant here is the Ivanhoe Building & Loan Association, and in its behalf it is asserted that it is entitled to prove its claim in the bankruptcy proceedings for the full [fol. 9] amount of its final decree with interest and costs less the sum of one hundred dollars bid at the sheriff's sale. It is urged on behalf of the trustee that the Ivanhoe Building & Loan Association must credit on account of its claim the value of the real estate which it took under the foreclosure, and which value is conceded by both sides to this controversy as the sum of $9000. Counsel for the Loan Association bases his contention upon Section 1, subsection (23) of the Bankruptcy Act, which reads as follows:

"Secured creditor shall include a creditor who has security for his debt upon the property of the bankrupt • • • "

And he contends that the property not being owned by the bankrupt at the time of the filing of the petition in bankruptcy, the value thereof cannot be considered in reduction of the mortgagee's claim. In other words, that the bankrupt having disposed of the property prior to bankruptcy, leaves the trustee here in a position where the value of the property cannot be used in reduction of the Loan Association's claim.

On reading subsection (23), nothing is found which would indicate that the definition limits the "secured creditor" to mean or intend that the bankrupt shall continue to own or hold the equity of redemption over and above the mortgage down to and including the date when bankruptcy becomes effective. It is, I think, sufficient if it be shown that the bankrupt owned the collateral at the time it was mortgaged or hypothecated, or took the property subject to and assumed to pay such mortgage or other obligation. Once a mortgage always a mortgage. The subsequent deed made by the bankrupt to Yavne was also made expressly subject to the mortgage. So the real estate security for the mortgage remained the same throughout the life of the mortgage, and in fact that security was subsequently [fol. 10] taken by foreclosure. The law is well established in the federal court and in bankruptcy that the value of collateral shall be set off against secured claims; and when Yavne took title, he took subject to all of the legal and equitable implications, among them the right to have the true value of the security applied against the loan: and when the Loan Association makes its claim as it does here, in bankruptcy, the trustee in bankruptcy is entitled to have the value of the collateral credited against the amount due under the foreclosure proceedings. It should be borne in mind that the trustee stands in the place of the bankrupt in a transaction such as this, and surely had there been no bankruptcy proceedings, the Eastern Sash & Door Company would have been entitled to have the true value of the real estate set off in reduction in a deficiency suit.

I am not unmindful of the ruling in re Pan-American Match Company in 242 Fed. 995, nor is my conclusion here in conflict with the ruling in that case, since I hold that the bankrupt has a property in the real estate and that property is a right to have the collateral applied in reduction

of its loan, in this instance the value of the real estate, as against the mortgage money.

An order will therefore be entered, confirming the Referee's report.

Mr. Alboum: May I have an exception?
The Court: Exception allowed.

Which exception is hereby allowed and sealed accordingly.

——— ———, Judge.

[fol. 11] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING PETITION TO REVIEW REFEREE'S ORDER—Filed January 15, 1934

It appearing to the Court that an order was entered November 21, 1933, reducing the claim of the Ivanhoe Building & Loan Association of Newark, N. J., to the sum of $1,739.94 and that the said claimant on November 28, 1933, filed a petition for a review of the Referee's order and after hearing Abraham Alboum, of counsel for the petitioning claimant, and Sydney L. Jacobs, appearing for Charles E. Hendrickson, of counsel for the trustee and it appearing to the satisfaction of the Court that the petition of the Ivanhoe Building & Loan Association of Newark, N. J., should be dismissed and that the order of the Referee reducing the said claim to the sum of $1,739.94 should be confirmed.

It is on this fifteenth day of January, 1934, on motion of Sydney L. Jacobs, appearing for Charles E. Hendrickson, of counsel for Thomas A. Orr, trustee of the above-named bankrupt, Ordered that the petition of the Ivanhoe Building & Loan Association of Newark, N. J., to review filed herein on November 28, 1933, be and the same is hereby dismissed.

And it is further ordered that the order of George W. W. Porter, Esq., Referee herein, dated the twenty-first day of November, 1933, reducing the claim of the Ivanhoe Building & Loan Association of Newark, N. J., to the sum of $1,739.94 be and the same is hereby confirmed.

Guy L. Fake, District Judge.

[fol. 12] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed February 14, 1934

Please take notice, that on the fourteenth day of February, 1934, at 10 o'clock A. M., I will file and present for allowance to the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit, or the clerk of said court in the City of Philadelphia, a petition for review in the above-entitled cause, a copy of which petition is annexed hereto and made part of this notice, and I will then ask to have the same docketed and the necessary order made therein to have such case set down for hearing.

Abraham Alboum, Attorney for Petitioner, 130 Market Street, Newark, New Jersey.

To Charles E. Hendrickson, Esq., Attorney for Trustee, 75 Montgomery Street, Jersey City, New Jersey.

[fol. 13] Service of the within notice and petition for review is hereby acknowledged this thirteenth day of February, 1934, and I hereby consent to the filing and presentment for allowance thereof as of time.

Charles E. Hendrickson, Attorney for Trustee.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR REVIEW—Filed February 14, 1934

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

Your petitioner, the Ivanhoe Building & Loan Association of Newark, N. J., appearing by Abraham Alboum, its attorney, respectfully represents that:

1. Your petitioner on review is a corporation duly organized and existing under the laws of the State of New Jersey, with its principal office in the City of Newark,

County of Essex and State of New Jersey, and is a creditor of the above-named Eastern Sash & Door Company, which was duly adjudged bankrupt by the United States District Court for the District of New Jersey on the twenty-third day of April, 1932.

2. After adjudication of bankruptcy the proceedings for the administration of the estate were duly referred to George W. W. Porter, Esquire, Referee in Bankruptcy, before whom the petitioner filed its proof of debt, as an unsecured claimant. On July 12, 1933, the Trustee herein filed a petition for consideration and rejection of said claim, and on July 12, 1933, the Referee in Bankruptcy [fol. 14] made an order directing the petitioner to show cause why the said claim should not be re-examined, rejected and expunged for the reason stated in said petition. Hearings were held before said Referee, at which hearings the same facts were adduced as stated in the stipulation of facts filed herein. And the matter having been duly argued and heard, the said Referee did, on November 21, 1933, make and file an order that the said claim be reduced to $1,739.94 and allowed at said amount upon the list of claims, as a general unsecured claim. A copy of said order is printed in this transcript.

3. Thereupon petitioner filed exceptions to the Referee's said order and on November 28, 1933, the petitioner filed a petition for review of the Referee's said order. Thereafter said Referee filed a certificate of review, as provided by law.

4. Said petition for review came on to be heard before Honorable Guy L. Fake, Judge of the United States District Court, who, upon consideration thereof, did, on January 15, 1934, make an order confirming the Referee's said order. Petitioner duly excepted to the said order, which exception was allowed and sealed accordingly. A copy of said order is printed in this transcript.

5. Your petitioner shows that the said order made by the said Honorable Guy L. Fake, Judge of said District Court, as aforesaid, was erroneous in matter of law, in that:

(a) Petitioner is an unsecured creditor and is entitled to prove its claim in the bankruptcy proceedings for the full amount of its claim, being the deficiency on its bond, less the $100 bid at the sheriff's sale.

[fol. 15] (b) Petitioner is an unsecured creditor and its said claim should have been allowed in full, without any credit or set-off whatsoever for the value of the property in question, for the reason that the said property did not belong to the bankrupt at the time of the said adjudication.

(c) That said order of the United States District Court for the District of New Jersey should have been for your petitioner and not for the Trustee.

(d) That said order of the United States District Court for the District of New Jersey should have reversed the order of the Referee in Bankruptcy.

Wherefore, your petitioner prays that the said order made by said Honorable Guy L. Fake, Judge of the United States District Court for the District of New Jersey, hereinbefore set forth, may be reviewed, revised and reversed by this Honorable Court, in the matters, respects and particulars hereinabove set forth; and that said order may be set aside and for nothing holden; and that the order filed by said Referee, Honorable George W. W. Porter, dated November 21, 1933, may be reversed; and that your petitioner be restored to all things that it may have lost thereby.

And your petitioner, as in duty bound, will ever pray, etc.

Dated January 26, 1934.

Abraham Alboum, Attorney for Petitioner.

[fol. 16] *Duly sworn to by Max E. Fischman. Jurat omitted in printing.*

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER ALLOWING PETITION FOR REVIEW TO BE FILED—Filed February 14, 1934

It is ordered that the petition of The Ivanhoe Building & Loan Association of Newark, N. J., for review in the above-entitled cause be filed in this Court and the case placed on the list for argument at the March term of 1934.

Philadelphia.

Dated: February 14, 1934.

J. W. Thompson, Circuit Judge.

[fol. 17] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed February 23, 1934

Now comes The Ivanhoe Building & Loan Association of Newark, N. J., appellant, and files this its assignments of error, complaining as follows:

1. The order of the District Court of the United States for the District of New Jersey, made and entered on January 15, 1934, confirming the order of George W. W. Porter, Esquire, Referee in Bankruptcy, reducing the claim herein to $1,739.94, was erroneous in matter of law, in that:

(a) Appellant is an unsecured creditor and is entitled to prove its claim in the bankruptcy proceedings for the full amount of its claim, being the deficiency on its bond, less the $100 bid at the sheriff's sale.

[fol. 18] (b) Appellant is an unsecured creditor and its said claim should have been allowed in full, without any credit or set-off whatsoever for the value of the property in question, for the reason that the said property did not belong to the bankrupt at the time of its adjudication.

(c) That said order of the United States District Court for the District of New Jersey should have been for appellant and not for the Trustee.

(d) That said order of the United States District Court for the District of New Jersey should have reversed the order of the Referee in Bankruptcy.

Abraham Alboum, Attorney for and of Counsel With Appellant.

[fol. 19] UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

March Term, 1934

No. 5434

IVANHOE BUILDING & LOAN ASSOCIATION, Appellant,

vs.

THOMAS A. ORR, Trustee of Eastern Sash & Door Co., Bankrupt, Appellee

Appeal from the District Court of the United States for the District of New Jersey

And now, to wit: this fourth day of April, A. D. 1934, it is ordered that Hon. Albert W. Johnson, District Judge for the Middle District of Pennsylvania, and Hon. William Clark, District Judge for the District of New Jersey, be, and they are hereby assigned to sit in above case in order to make a full court.

J. Warren Davis, Circuit Judge.

Endorsements: Order Assigning Hon Albert W. Johnson and Hon. William Clark for argument. Rec'd and filed Apr. 4, 1934. Wm. P. Rowland, Clerk.

[fol. 20] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

March Term, 1934

No. 5434

IVANHOE BUILDING & LOAN ASSOCIATION, of Newark, N. J., Appellant,

vs.

THOMAS A. ORR, Trustee of Eastern Sash & Door Co., Bankrupt, Appellee

And afterwards, to wit, the 4th day of April, 1934, come the parties aforesaid by their counsel aforesaid, and this

case being called for argument sur pleadings and briefs, before the Honorable J. Warren Davis, Circuit Judge, and Honorable Albert W. Johnson and Honorable William Clark, District Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 3d day of October, 1934, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 21] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

March Term, 1934

No. 5434

IVANHOE BUILDING & LOAN ASSOCIATION, OF NEWARK, NEW JERSEY, Appellant,

v.

THOMAS A. ORR, Trustee of Eastern Sash & Door Company, Bankrupt, Appellee.

Appeal from the District Court of the United States for the District of New Jersey.

Before Davis, Circuit Judge, and Clark and Johnson, District Judges.

OPINION—Filed October 3, 1934

DAVIS, Circuit Judge:

This is an appeal from an order of the District Court reducing the claim of the appellant filed in the bankrupt estate of the Eastern Sash & Door Company by the amount of the value of the collateral which it held.

On July 21, 1927, Abraham Portnoff and others executed to the Ivanhoe Building and Loan Association a bond for the sum of $23,000 conditioned for the payment of $11,500, and to secure the payment thereof, they executed a mortgage on premises known as 386 Leslie Street, Newark, New [fol. 22] Jersey. This property was conveyed to the East-

ern Sash and Door Company, bankrupt, on October 7, 1927, subject to the mortgage, which the bankrupt in the deed expressly assumed and agreed to pay. On the same day the bankrupt conveyed the property to Clara Yavne.

On April 2, 1932, the appellant, Ivanhoe Building and Loan Association, filed a bill to foreclose the mortgage and on June 20, 1932, a final decree was entered in the foreclosure proceeding. The Court found that there was due the appellant on the mortgage the sum of $10,220.96 together with interest and costs. The property was sold by the sheriff and was bid in by the appellant-mortgagee for $100.

On April 23, 1932, the Eastern Sash and Door Company on an involuntary petition was adjudicated a bankrupt and the appellant filed its claim as an unsecured creditor for $10,739.94 which is the difference between the sum found to be due on the mortgage and the $100 which was paid for the property at the sheriff's foreclosure sale. It is admitted by everybody that the market value of the property is $9000 and the question before us is whether or not the appellant must reduce its claim on which it will receive a dividend by that amount, bringing it down to $1,739.94, or whether it is entitled to file it for the $10,739.94, the amount due on the bond less the $100 received at the sale.

The referee and District Court disallowed the claim and held that appellant was entitled to file a claim for only the $1,739.94.

The appellant says that it should be allowed to file for the full amount of its claim of $10,739.94 because it is not a "secured creditor" as defined by Section 1 (23) of the Bankruptcy Act for the reason that it does not have security for its debt upon the property of the bankrupt which conveyed the mortgaged premises to Clara Yavne the same day the property was conveyed to it. This section provides that:

[fol. 23] "a secured creditor shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets."

Section 57 (e) provides that:

"claims of secured creditors * * * shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities."

Consequently, appellant says, since the title to the mortgaged premises was not in the "bankrupt" and that no person secondarily liable had security on the bankrupt's assets when the petition in bankruptcy was filed, it is not a "secured creditor"; that there were no mutual debts or credits between it and the bankrupt and it does not have to set off its security against the debt, but may file proof for his entire claim.

Remington on Bankruptcy (3rd Ed.), Vol. 2, page 306, Section 917, says:

"Where the property held as security is not the property of the bankrupt, the claim should be allowed without deduction for the value of the securities."

Collier on Bankruptcy (13th Ed.), Vol. 2, page 1144, says that

"the question pertains in each case to the security which a creditor has upon the property of the bankrupt. No matter how great may be the security which one may have, if it be property of another than the bankrupt, the creditor may prove his entire claim against the bankrupt estate, and receive a dividend thereon, and thereafter institute proceedings to enforce his claim upon the security for the balance." [fol. 24] The following authorities are to the same effect. In re Noyes Bros. 127 Fed. 286; In re Keep Shirt Co. 200 Fed. 80; In re Pan-American Match Co., 242 Fed. 995; Manufacturers Acceptance Corporation v. Hale et al., 65 Fed. (2d) 76. Being an unsecured creditor, appellant says that upon these and other authorities, it should have been allowed to prove its entire claim as a basis upon which to calculate its dividend in the bankrupt estate.

It seems to be well settled that security given to the surety by a person other than the bankrupt is not regarded as part of the bankrupt estate and does not increase or "swell" the assets of the estate or exonerate it. An unsecured creditor, not holding security belonging to the bankrupt, may prove his entire claim against the estate and if the dividends received on the claim together with the secur-

ity pledged by a person other than the bankrupt exceed the amount of the claim, the claimant holds the excess as trustee for that other person. Gorman v. Wright, 136 Fed. 164; In the Matter of Hanson & Tyler Auto Co. et al., 286 Fed. 161; Hampel et al. v. Minkwitz, 18 Fed. (2d) 3.

The case of Winter's Appeal, decided by this court, 174 Fed. 556, cited and relied upon by the appellee, is not contrary to this rule of law, for in that case title to the property was in the bankrupt and the claimant admitted that the property, purchased by him at the foreclosure sale, which secured the bond on which the claim was based, was worth more than the amount of the mortgage and costs. Consequently the claim was fully paid and there was no ground for its allowance. In the Matter of Dix, 176 Fed. 582, the claimant, who bid in the property for a nominal sum at a foreclosure sale on mortgages given by the bankrupt, filed his claim against the bankrupt estate for the balance of his debt. The court held that the value of the property purchased should be inquired into and the claim al- [fol. 25] lowed only for the amount equitably due. This case followed the Winter decision, both being based upon the same rule of law and written by Judge McPherson of this court.

But in the case at bar the bankrupt expressly in writing assumed and agreed to pay the mortgage. It then had title to the property which was the security on which the bankrupt assumed the obligation. When the bankrupt conveyed the property to Mrs. Yavne, the transfer did not release it from the obligation to pay the mortgage and it has not been shown that the appellant released the bankrupt. When the mortgage was foreclosed, the obligation of the bankrupt to pay the mortgage still existed, but the appellant-mortgagee purchased the property for a nominal sum. While the obligation of the bankrupt to pay the mortgage still remained, the mortgagee had gotten possession of the security and in enforcing this obligation against the bankrupt, the appellant-creditor must reduce its claim by the admitted value of the security less the $100 paid for it. The bankrupt owed the appellant the amount of the mortgage and the appellant equitably owed the bankrupt the value of the security in his possession. Under these circumstances, Section 68 (a) of the Act applied, which provides that:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

The order is affirmed.

A true copy—Teste:
——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 26] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

March Term, 1934

No. 5434

IVANHOE BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, Appellant,

vs.

THOMAS A. ORR, Trustee of Eastern Sash & Door Co., Bankrupt, Appellee

Appeal from the District Court of the United States for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order or decree of January 15, 1934, of the said District Court in this cause be, and the same is, hereby affirmed, with costs.

Philadelphia, October 3, 1934.

J. Warren Davis, Circuit Judge.

Endorsements: Order Affirming Order of Jan. 15, 1934. Rec'd and filed Oct. 3, 1934. Wm. P. Rowland, Clerk.

[fol. 27] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of Ivanhoe Building & Loan Ass'n of Newark, N. J., Appellant, vs. Thomas A. Orr, Trustee of Eastern Sash & Door Co., Bankrupt, Appellee, No. 5434, on file and now remaining among the records of the said Court, in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 5th day of November, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the United States the one hundred and fifty-ninth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 26] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 4, 1935.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,239. U. S. Circuit Court of Appeals, Third Circuit. Term No. 611. The Ivanhoe Building and Loan Association of Newark, N. J., Petitioner, vs. Thomas A. Orr, Trustee of Eastern Sash & Door Company, Bankrupt. Petition for a writ of certiorari and exhibit thereto. Filed December 29, 1934. File No. 611, O. T., 1934.